# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 127.

THE UNITED STATES, PLAINTIFFS,

vs.

CLARK IRVINE.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 8, 1876.

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1 UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

In the circuit court of the United States for the western district of Missouri.

THE UNITED STATES
*vs.* } No. 719.
CLARK IRVINE.

Be it remembered that heretofore, to wit, on the 14th day of April, A. D. 1876, in vacation of said circuit court, the following proceedings were had in said cause, to wit:

THE UNITED STATES
*vs.* } No. 719.
CLARK IRVINE.

This day there is received from the clerk of the United States district court for the western district of Missouri, and filed herein, a transcript of the record in the above cause, together with the following papers, viz: Indictment, affidavit for continuance, recognizance, demurrer to indictment, demurrer to evidence, verdict, motion to set aside verdict, motion to arrest judgment, plea of defendant, and other papers.

The transcript above referred to is in words and figures following, to wit:

2 UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

In the district court of the United States for the western district of Missouri.

Be it remembered that at a regular stated term of the district court of the United States for the western district of Missouri, begun and held at the city of Jefferson, in said district, the first Monday, the 6th day, of September, A. D. 1875, the following proceedings were entered of record:

Present, the honorable Arnold Krekel, judge; James S. Botsford, district attorney; George Smith, marshal; & Alfred S. Krekel, clerk.

WEDNESDAY, *September* 15*th*, 1875.

The grand jurors come into court and make the following presentment, to wit:

THE UNITED STATES
*vs.* } No. 1228. Ind't for retaining pension. A true bill.
CLARK IRVINE.

Which said original bill of indictment is remitted to the circuit court of the United States for the western district of Missouri, as per order of court.

And afterwards, at said stated term of said district court begun and held as aforesaid, the following further proceedings were had in said case, to wit:

3 SATURDAY, *September* 18*th*, 1875.

UNITED STATES
*vs.*
CLARKE IRVIN. } No. 1228. Indictment.

*Plea.*

On this day comes the district attorney on behalf of the United States, and also comes the defendant, Clarke Irvin, in his own proper (person) and by his attorney, Flanagan, and it being forthwith demanded of the said defendant of and concerning the premises and how he will acquit himself, for plea says he is not guilty as charged in the indictment preferred against him, & for his trial puts himself upon the country, and the United States do the like.

And afterwards, to wit, at said stated term of said district, begun and held as aforesaid, the following further proceedings were had in said case, to wit:

MONDAY, *September* 20*th*, 1875.

THE UNITED STATES
*vs.*
CLARKE IRVIN. } No. 1228. Ind'c't.

And now it is ordered by the court that the defendant, Clarke Irvine, enter into recognizance in the sum of one thousand dollars for himself, and in a like sum on the part of good and sufficient sureties, conditioned for his personal appearance before this court from day to day and
4 term to term during the pending of the indictment herein preferred against him, and that he be remanded into the custody of the marshal until he shall have entered into such recognizance.

And afterwards, to wit, at said stated term of the district court, begun & held as aforesaid, the following further proceeding' were had in said case, to wit:

TUESDAY, *September* 21*st*, 1875.

THE UNITED STATES
*vs.*
CLARKE IRVIN. } No. 1228. Indictment.

On this day comes the district attorney on behalf of the United States, and also comes the defendant, Clarke Irvin, in his own proper person and by his attorney, Henry Flanagan, when an application for a continuance, verified by the oath of the defendant, is filed.

And now come John C. Hendricks, William Spanomore, and Elizabeth C. Berkley, and severally acknowledge themselves indebted to the United States each in the sum of five hundred dollars, to be levied of their goods and chattles, lands and tenements, and to the United States rendered, conditioned for their personal appearance before this court
5 on the first Monday in March, 1876, to testify on behalf of said United States in the cause wherein Clarke Irvin is defendant, and not to depart the said court without leave thereof.

And is now ordered by said court that this cause be, and the same is, continued to the March term, 1876.

And afterwards, to wit, at said stated term of said district court, begun and held as aforesaid, the following further proceedings were had in said case, to wit:

WEDNESDAY, *Sept.* 22*d*, 1875.

THE UNITED STATES
*vs.* } No. 1228. Indictment.
CLARKE IRVIN.

On this day again comes the district attorney on behalf of the United States, also comes the defendant, Clarke Irvin, in his own proper person and by his attorney, Henry Flanagan, when it is ordered by the court that the recognizance of the said defendant and his sureties be taken by H. K. White, a commissioner of the circuit court of the United States for the western district of Missouri, at St Joseph, the sureties offered to be by said commissioner examined, under oath, touching their sufficiency, and the testimony so taken and subscribed by the sureties to be attached to and forwarded with such recognizance to this court.

6 And it is now further ordered that this cause be continued to the March term, 1876, of this court.

And afterwards, to wit, at said stated term of the district court, begun and holden as aforesaid, the following further proceedings were had in said case, to wit:

WEDNESDAY, *September* 29*th*, 1875.

UNITED STATES
*vs.* } No. 1228. Indictment.
CLARKE IRVIN.

On this day the recognizance of the defendant, Clarke Irvin, in the sum of one thousand dollars, with Bennett Pike and John C. Bender sureties, is filed and approved.

And be it remembered that at a regular stated term of the district court of the United States for the western district of Missouri, begun and held at Jefferson City the first Monday, the sixth day of March, A. D. 1876, the following proceedings were had in the said case on Monday, March 6th, 1876, to wit:

*Demurrer to ind't.*

THE UNITED STATES
*vs.* } No. 1228.
CLARKE IRVINE.

Indictment retaining pension from claimants as att'y & ag't.

On this day comes the district attorney on behalf of the United States, and also comes the defendant, Clarke Irvin, in his own proper
7 person, and by his attorney, Henry Flanagan, and thereupon, with leave of court, the plea of not guilty heretofore entered herein is withdrawn, when a demurrer to the indictment is filed.

And afterwards, to wit, on Tuesday, March 7th, 1876, the following further proceeding were had in said case, to wit :

UNITED STATES
*vs.*
CLARKE IRVIN. } No. 1228. Indictment.

On this day comes the district attorney on behalf of the United States, also comes the defendant, Clarke Irvine, in his proper person, and by Henry Flanagan, his attorney, when the demurrer heretofore filed herein is argued by counsel and submitted.

And afterwards, to wit, on Wednesday the 8th day of March the following further proceedings were had in said case, to wit:

*Demurrer overruled.*

THE UNITED STATES
*vs.*
CLARKE IRVIN. } No. 1228. Indictment.

On this day comes the district attorney on behalf of the United States, and also comes the defendant, Clark Irvine, in his own proper person, and by Henry Flanagan, his attorney, and the court, being fully advised, is of the opinion that the law upon the demurrer heretofore filed and submitted is for the United States, and in accordance with such opinion—

8

It is ordered and adjudged that such demurrer be, and the same is, overruled, and thereupon the plea of not guilty is renewed.

And afterwards, to wit, on Thursday, the 30th day of March, 1876, the following further proceedings were had in said case, to wit:

*Plea in bar.*

THE UNITED STATES
*vs.*
CLARKE IRVIN. } No. 1228. Indictment.

On this day comes the district attorney on behalf of the United States, also comes Clarke Irvin in his own proper person, and by his attorney, Thomas H. Kemp, when a plea in bar and tending the general issue is filed by the defendant.

And afterwards, to wit, at said last-mentioned stated term of said district court, begun and held as aforesaid, the following further proceedings were had in said case on Saturday, the 1st day of April, 1876, to wit:

*Plea.*

THE UNITED STATES
*vs.*
CLARKE IRVIN. } No. 1228. Indictment.

On this day comes the district attorney on behalf of the United States,

and also comes the defendant, Clarke Irvin, in his own proper person, and by his attorneys, Flanagan & Kemp, and it being demanded of the defendant of and concerning the premises, and how he will
9 acquit himself, for plea says he is not guilty as charged in the indictment preferred against him, and for his trial puts himself upon the country, and the United States do the like.

And thereupon come a jury, to wit, J. R. French, C. Robertson, J. M. Johnson, Stephen Herndon, H. L. Hall, John Hammond, B. F. Olden, W. H. Hillis, R. Slater, B. F. McAllister, M. C. Draper, and Clay Vaughn, twelve good and lawful men duly elected, tried, & sworn well and truly to try and true deliverence make between the United States and the defendant, Clark Irvin, when evidence is heard on part of the United States.

*Demurrer to evidence.*

And now the said defendant by his attorney files a demurrer to the evidence, which, being submitted, is by the court overruled, and the jury being charged, the cause not being argued by counsel, return the following verdict:

*Verdict.*

"We, the jury, find the defendant guilty in the manner and form as charged in the indictment.

"JOHN HAMMOND,
"*Foreman.*"

And afterwards, to wit, on Monday, April 3d, 1876, the following further proceedings were had in said case, to wit:

10 *Motion for new trial.*

UNITED STATES
*vs.*
CLARK IRVIN. } No. 1228. Indictment.

On this day comes the district attorney on behalf of the United States, and also comes the defendant, Clarke Irvin, in his own proper person, and by his attorney, Thomas H. Kemp, when a motion for a new trial and a motion in arrest of judgment are filed.

And afterwards, to wit, on Thursday, the 6th day of April, 1876, the following further proceedings were had in said case, to wit:

*Motion for new trial, &c.*

THE UNITED STATES
*vs.*
CLARKE IRVIN. } No. 1228. Indictment.

On this day comes the district attorney on behalf of the United States, and also comes the defendant, Clarke Irvin, by Henry Flanagan, of counsel, when on his motion it is ordered by the court that the defendant have leave to withdraw the motion for a new trial and in arrest

of judgment heretofore filed, and to file a new motion for new trial and in arrest, which motions are thereupon filed, and it being the opinion of the court that the question of law as to the application of the statute of limitations in this case, and as to the repeal of the 12th and 13th sections of the act of July 4th, 1864, by the 8th section of the act of July 8th, 1870, are important and difficult, and involved in the case, it is ordered that pursuant to section 1038 of the Revised Statute', and for purpose of determining said question, the indictment and all other papers in the case be remitted to the circuit court of the United States for this district, and that said defendant, Clarke Irvin, be and appear before said last-named court on the first day of the April term, 1876, of said court.

Question of law.

11

UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

I, Louis Schmidt, clerk of the United States district court for the western district of Missouri, do hereby certify that the above and foregoing writing to be a true and complete record of the record in the above entitled case, as full as the same remains of record in said case in this office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of Jefferson, this 13th day of April, 1876.

12

{ SEAL OF THE DIST. COURT WEST. DIST. OF MO. }

LOUIS SCHMIDT,
*Clerk*,
By CHA'S E. HESS, *D. C.*

The indictment referred to and filed in this case is in words and figures following, to wit:

*Indictment.*

UNITED STATES OF AMERICA,
*Western District of Missouri:*

In the United States district court for the western district of Missouri, at the September term, 1875.

The grand jurors of the United States, duly empannelled, sworn, and charged to inquire within and for the said western district of Missouri, on their oath present that Clarke Irvin, late of said district, on the twenti'th day of February, in the year of our Lord eighteen hundred and seventy-one, and continuously from said last mentioned day until the present time, at the district aforesaid, did wrongfully withhold from one Elizabeth C. Berkley, who was then and there a claimant of the United States for the pension allowed her by law for her deceased husband, Leonidas Berkley, the sum of five hundred and twenty-five dollars, which was then and there and still is due from and allowed by the United States, he, the said Clarke Irvin being then and there the agent and attorney of the said Elizabeth C. Berkley for the collection of said claim, and having then and there received such money from the United States, as such agent and attorney, for the use and benefit of the said Elizabeth Berkley, contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

13

JAMES S. BOTSFORD,
*United States Attorney.*

(Endorsed on it:) No. 1228. United States vs. Clarke Irvin. A true bill. J. A. Griffith, foreman of the grand jury.

Filed Sept. 15, 1875.

A. S. KREKEL, *Clerk.*

Filed April 14, 1876.

H. C. GEISBERG, *Clerk.*

The affidavit for continuance referred to and filed in this case is in words and figures following, to wit:

14 *Affidavit for continuance.*

UNITED STATES } No. .
*vs.*
CLARK IRVINE. }

Indict. for withholding pension from Elizabeth C. Berkley et al.

SAME } No. .
*vs.*
SAME. }

Indict. for same in case of W'm Spanamore.

Clarke Irvine, being duly sworn, deposes and says that he cannot safely proceed to trial of said indictments at the present term of this court on account of the absence of material testimony, which consists of books and papers to which he cannot get access at the present time, but expects to procure before the next term of court, and also on account of the absence of material witnesses whose testimony he expects to obtain before the next term of court, viz: In the case of Elizabeth Berkley, he expects to show by the books of the former banking firm of Zook and Scott, and of James Scott, that the greater part of the pension due said Berkley was paid to her, if any sum was due her whatever; and also he expects to show, by receipts and other instruments, that she obtained the whole sum due her up to the year 1870; but said receipts and papers it will require a search among his papers to find, as affient transacted business for a large number of persons, and the affairs of said Berkely were settled six years ago or prior to that time; he also expects
15 to show by the testimony of one Williams and Stocking that said Berkelly received full satisfaction and payment of all money due her that ever came into this affients hands; and also by papers from the Pension Office at Washington City, and copies of the records there, that said Berkelly, at the time she alleges that affient withheld her pension, to wit, the sum of five hundred and dollars, was entitled to but seven hundred dollars, which this defendant expects to show she received in full from him by said witnesses and books.

In the case of W'm C. Hendrix, this affient expects to show that said Hendrix had no more control or interest in the pension bounty money he alleged affient retained than any other stranger, the same being the property of his wife, now deceased, and jealously guarded from his control or handling by the Pension Office, and that about seven years have elapsed since affient paid over to the claimant, M'r's Hendrix, wife of said Hendrix, all money ever received by him in any capacity, and that owing to

the conduct of said Hendrix, his deceased wife desired affiant to pay money to her privat'ly.

Affiant expects to show said facts in the indictment first above mentioned by the books of said banking firm, by papers from the
16 Pension Office and bounty offices, and by the testimony of one M. Saville and of one C. W. Bowman, as well as by the accounts of moneys expended by this affiant in behalf of said deceased, M'r's Hendrix, for the prosecution of her claim for pension and bounty, as well as the testimony of some attorneys in Illinois, whose names deponent cannot state without reference to his books, whom affiant employed and paid to aid in prosecuting the claims, and also paid out large sums tender to procure the requisite evidence.

Also in the case of W'm Spanamore, affiant expects to show by copies from the records of the Pension Office the exact sum said Spanamore was entitled to, and by affiant's books and accounts that affiant paid out very large sums in prosecuting the claim for him, and advanced money to him on his urgent solicitation, he being sick and very needy, and also paid doctor bill and other bills to one W'm L. Gorden and others, and also bills affiant became surety for and paid; and also by receipts of said Spanamore and the testimony of one Thomas C. Dungan, of Oregon, Holt Co., Missouri, that said Spanamore received of affiant every cent due him that ever came into affiant's possession or under his control in any capacity whatever.

17 Affiant states that none of said witnesses above named are absent with the advise or procur'ment of affiant, and that some of them have removed to parts unknown to him at this time, but whom he expects to find before next term of this court. That said M. Saville, a resident of Holt Co., Missouri, is absent on a tour for his health, as is reported, and said Dunga, a resident of the same county, is absent from home, as deponent is informed and believes, but where he knows not; and said Bowen is a resident of Colorado, where he is at present.

Defendant further says that on the 18 Sept., inst., he was first informed that the indictment above named had been found against him; that his residence is upwards of 280 miles from Jefferson City; that subpœnas for said witnesses would be unavailing, as some are outside t'e jurisdiction of this court and beyond the reach of subpœna process, and as to the others he cannot say where they are at present. He further says that there are other witnesses whose testimony will be material to him on the trial of said indictment, but whose names he cannot now state without reference to his books, but he hopes to
18 procure the testimony of all the witnesses above named before next term of this court. He further says this application for a continuance is not made for vexation or delay, but in sincerity & truth and for the purpose above stated; and that he cannot prove the same facts by any other witnesses attending here at this court.

CLARKE IRVINE.

Sworn to & subscribed before me on this 20th Sept., A. D. 1875.

CHARLES E. HESS,
*Com'r U. S. C't C't West. Dist. Mo.*

The recognizance of said Clarke Irvine, referred to and filed in this case, is in words and figures following, to wit:

*Recognizance.*

UNITED STATES OF AMERICA,
*Western District of Missouri, set.:*

Be it remembered that, on the 24th day of September, 1875, Clark Irvine, as principal, and Bennett Pike and John C. Bender, as sureties, personally appeared before me, H. K. White, commissioner of the circuit court of the United States for the western district of Missouri (duly appointed by the circuit court of the United States for said district), and acknowledged themselves to owe and be indebted to the United States of America, that is to say: The said Clarke Irvine in the sum of one thousand dollars, and the said Bennett Pike and John C. Bender each in the sum of one thousand dollars, to be levied of their respective goods and chattels, lands and tenements, and to the United States rendered, if the said Clarke Irvine shall fail to comply with the conditions hereunder written; and the said conditions of this recognizance are such that if the above-bounden Clarke Irvine shall personally appear before the district court of the United States for the western district of Missouri on the first Monday of March, 1875, at the city of Jefferson, in the State of Missouri, to answer an indictment which may be preferred against him by the grand jury of the United States, or information which may, with leave of court, be filed against him by the district attorney of the United States for the western district of Missouri, for the offense whereof he stand charged; and further, if the said Clarke Irvine shall submit to and obey any and all orders made by the said district court during the pending of said indictment, information, charge, and not at any time absent himself or depart from said court without leave of said court or trial, and shall appear from day to day and term to term of said court as he may be ordered to do during the continuance of such charge, then this recognizance to be void; otherwise the same to remain in full force and virtue.

In witness whereof the said obligors set their hands and seals the day and year first above written.

CLARKE IRVINE. [SEAL.]
BENNETT PIKE. [SEAL.]
JOHN C. BENDER. [SEAL.]

Signed, sealed and acknowledged by the said Bennett Pike & John C. Bender, before me, at the city of S't Joseph, western district of Missouri, this 24th day of September, 1875.

H. K. WHITE,
*Commissioner U. S. Circuit Court, Western District of Missouri.*

UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

Bennett Pike, one of the above-named sureties, being first duly sworn, deposes and says, that he is a resident of S't Joseph County, of Buchanan, and State of Missouri, and that he is worth, after paying all his debts and deducting all exemptions from seizure under execution by reason of law of this State and of the United States, no less than two thousand dollars; that said property is situate in the western district of Missouri, counties of Buchanan, Atchison and Holt, and was assessed at last assessment for State and county purposes, at at least two thousand dollars.

BENNETT PIKE.

Subscribed and sworn to before me this 24th day of September, 1875.

H. K. WHITE,
*Commissioner U. S. Circuit Court, Western District of Missouri.*

UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

John C. Bender, one of the above-named sureties, being first duly sworn, deposes and says: That he is a resident of St Joseph, county of Buchanan, and State of Missouri, and that he is worth, after paying all his debts and deducting all exemptions from seizure under execution by reason of law of this State and of the United States, no less than two thousand dollars; that said property is situate in the western district of Missouri, counties of Buchanan, Andrew, and Holt, and was assessed at last assessment for State and county purposes at at least two thousand dollars.

JOHN C. BENDER.

Subscribed and sworn to before me this 24th day of September, 1875.

H. K. WHITE,
*Commissioner U. S. Circuit Court, Western District Missouri.*

22 The demurrer to indictment referred to and filed in this cause is in words and figures following, to wit:

*Demurrer.*

Dist. court of the U. S., west. dis't of Mo.

THE UNITED STATES OF AMERICA
*vs.*
CLARKE IRVINE. } No. 1228.

And the said defendant comes in his own proper person, and having heard the indictment herein against him read, says the same is insufficient in law to be answered unto, and he demurs thereto, and for cause of demurrer says:

1st. It appears by said indictment that more than two years had elapsed from the date of the alleged commission of the offense by said defendant to the finding of said indictment.

2d. Because there was no law in force at the date of the alleged offense making the withholding of pension money, as charged in the indictment, an offense against the United States.

3d. Because the law now in force, and which was in force at the time said indictment was found, and upon which said indictment was found, was passed since the date of the alleged offense charged in the indictment; and because the said act imposes punishment for said alleged offense not known to the law at the time the offense is alleged

23 to have been committed.

And because the said indictment is informal and insufficient.

Wherefore the defendant prays judgment whether he ought further to answer said indictment.

HENRY FLANAGAN,
*Def't's Att'y.*

The plea to indictment referred to and filed in this cause is in words and figures following, to wit:

*Plea.*

In the United States district court for western district of Missouri, at March term, 1876.

UNITED STATES OF AMERICA }
vs.
CLARKE IRVINE. }

UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

Plea to the indictment found & brought in the said United States district court aforesaid, at the September term of said court, in the year eighteen hundred and seventy-five, held at Jefferson City, western district State of Missouri.

And the said Clarke Irvine, by Thomas H. Kemp, his attorney, comes into court here, and having heard the said indictment read charg-
24 ing (him), said Clark Irvine, with wrongfully withholding from one Elizabeth C. Berkley, a claimant of the United States for pension allowed her by law, for her deceased husband, Leonard Berkley, states & alleges that said indictment aforesaid was not found within two years next before said offense is therein alleged & charged to have been committed, and therefore says the United States aforesaid cannot maintain these proceedings against him. And for further plea of aforesaid, Clark Irvine, by his aforesaid attorney, Thomas H. Kemp, to aforesaid indictment, comes into court here, and having heard as aforesaid the aforesaid indictment read as aforesaid, says that he is not-guilty of said premises in said indictment above specified and charged upon him, and of this the said Clark Irvine puts himself upon the country, &c.

THOMAS H. KEMP,
*Attorney for Defendant.*

The demurrer to evidence referred to and filed in this cause is in words and figures following, to wit:

25 *Demurrer.*

U. S. }
*vs.*
IRVINE. }

The def't demurs to the evidence offered by the government, and says that the same is insufficient to support the indictment, because said evidence shows that if said def't is guilty of any offence, he is guilty of charging illegal fees and not of wrongfully withholding pension money.

THOMAS KEMP &
HENRY FLANAGAN,
*F'r Def't.*

The motion for a new trial referred to and filed in this cause is in words and figures following, to wit:

*Motion for new trial.*

THE UNITED STATES
*vs.*
CLARKE IRVINE. } 1228.

Now comes the said defendant and moves the court to set aside the verdict and to grant a new trial, for the reasons following:

The verdict is contrary to the law and the evidence.

2d. The court admitted improper evidence against the objection of the defendant.

26 3d. The court erred in overruling the demurrer of the def't to evidence of the government.

4th. The court erred in refusing the instructions asked by the def't and on the charge to the jury.

5th. The evidence showed that if the defendant had committed any offence it was barred by the statute of limitations.

HENRY FLANAGAN &
T. H. KEMP,
*F'r Def't.*

The motion in arrest of judgment referred to and filed in this cause is in words and figures following, to wit:

*Motion in arrest of judgment.*

THE UNITED STATES
*vs.*
CLARK IRVINE. } 1228.

Now comes the said defendant and moves the court to arrest the judgment herein for the following reasons:

1st. The indictment charges several distinct offences in the same count.

2d. The indictment contains material allegations repugnant to each other.

3d. The special plea of the defendant setting up the statute bar is confessed by the government, no replication having been filed thereto.

27 4th. The indictment shows that the supposed offence was committed more than two years next before the finding of the indictment.

5th. The verdict is not specific and does not show of what offence the def't is guilty.

6th. There is no offence stated in the indictment.

HENRY FLANAGAN &
T. H. KEMP,
*F'r Def't.*

And be it remembered that at the regular stated term of the circuit court of the United States for the western district of Missouri, begun and held at the city of Jefferson, in said district, the third Monday, the 17th day of April, A. D. 1876, and on the 25th day of April, 1876, present the honorable John F. Dillon and A. Krekel, judges, James S. Botsford, district attorney, George Smith, marshal, and H. C. Geisberg, clerk, the following proceeding' were had and entered of record, to wit:

UNITED STATES
*vs.*
CLARK IRVINE. } No. 719.

28 This day come the parties by their attorneys, the district attorney on behalf of the United States and Mess'rs Henry Flanagan and Lewis H. Waters, for the defendant, and thereupon this cause is submitted to the court upon the motion in arrest of judgment as certified from the district court, and the judges being divided in opinion respecting the question of law arising upon said motion in arrest, it is ordered upon the request of parties that the same be certified to the Supreme Court for decision at its next session. It is further ordered that the clerk make out and transmit to the Supreme Court a copy of the indictment and all record entries in this court. A certificate embodying the points of law upon which the judges are divided in opinion is signed by said judges and now ordered filed and made a part of the record.

The certificate of the judges mentioned above is in words and figures following, to wit:

UNITED STATES
*vs.*
CLARK IRVIN.

Be it remembered that on the trial of the above indictment, evi-
29 dence was offered proving that on the day named in the indictment, to wit, 24th day of December, 1870, Irvin, the defendant, as the agent and attorney of M'r's Elizabeth C. Berkley, named in the indictment, wrongfully withheld from her the amount of her pension money, to wit, $350, as stated in the indictment; that she then demanded payment thereof from said Irvin, but the same was refused on the ground that he had the right to retain money mentioned in the indictment as compensation for his services as such agent; that he had never paid over said money or any part of it to M'r's Berkley, but has ever since said 24th of December, 1870, withheld it from her; and thereupon the defendant asked the court to instruct the jury to acquit him because the offense was barred by the statute of limitations, which the court refused to do. And now the motion for a new trial and in arrest of judgment coming on to be heard, and the judges being divided in opinion on the following points, it is ordered, upon the request of the parties, that the same be certified to the Supreme Court for decision at its next session:

1. Are sections twelve and thirteen of the act of July 4, 1864,
30 page 389, 13 Statutes at Large repealed by section eight of the act of July 8th, 1870, page 195, 16 Statutes at Large?

2. Is the crime set out in the indictment a continuous one down to the time of finding the indictment?

3. Does the statute of limitations constitute a bar to this prosecution, the indictment having been found on the 15th of September, 1875?

4. Can the defendant be punished under section thirty-one of the act of March 3, 1873, page 575, 17 Statutes at Large, section 5485, Revised Statutes?

Given under our hands this 25th day of April, 1876.

JOHN F. DILLON.
A. KREKEL.

31 UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

I, Henry C. Geisberg, clerk of the circuit court of the United States for the western district of Missouri, do hereby certify that the writing hereto annexed is a true transcript of the indictment, demurrer thereto, affidavit for continuance, recognizance, plea to indictment, demurrer to evidence, motions for new trial and arrest of judgment, and of the transcript of the proceedings in the district court of the United States in and for the western district of Missouri, and also the proceedings had in the said circuit court in case No. 719, of the United States of America, plaintiff, against Clarke Irvine, defendant (indictment for retaining pension from claimants, as agent and attorney), as fully as the same remain on file and of record in said case in this office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of Jefferson, in said district, this 29th day of June, A. D. 1876.

[SEAL.] H. C. GEISBERG,
*Clerk.*

(Indorsement on cover:) No. 127. The United States, plaintiffs, vs. Clark Irvine. Certificate of division. W. Missouri C. C. U. S. Filed 8th July, 1876.

# In the Supreme Court of the United States.

OCTOBER TERM, 1878.

UNITED STATES
v.
CLARK IRVINE. } No. 127.

FROM UNITED STATES CIRCUIT COURT FOR WESTERN MISSOURI, ON DIVISION OF OPINION.

PLAINTIFF'S BRIEF.

# In the Supreme Court of the United States.

OCTOBER TERM, 1878.

UNITED STATES
*v.*
CLARK IRVINE. } No. 127.

FROM UNITED STATES CIRCUIT COURT FOR WESTERN MISSOURI ON DIVISION OF OPINION.

## PLAINTIFF'S BRIEF.

### STATEMENT.

Upon the trial of the indictment against the respondent, evidence was offered proving that on December 24, 1870, the day named in the indictment (which was filed September 15, 1875), the defendant Irvine, as the agent and attorney of Elizabeth C. Berkley, named in the indictment, wrongfully withheld from her the amount of her pension money, to wit, $350, as stated in the indictment; that she then demanded payment thereof from said Irvine, but the same was refused on the ground that he had the right to retain the money mentioned in the indictment as compensation for his services as such agent; that he had never paid over said money or any part of it to Mrs. Berkley, but has ever since December 24, 1870, withheld it from her; and thereupon the defend-

ant asked the court to instruct the jury to acquit him because the offense was barred by the statute of limitations, which the court refused to do.

And now the motion for a new trial and in arrest of judgment coming on to be heard, and the judges being divided in opinion on the following points, it is ordered, upon the request of the parties, that the same be certified to the Supreme Court for decision at its next session:

1. Are sections 12 and 13 of the act of July 4, 1864 (13 Stats., 389), repealed by section 8 of the act of July 8, 1870 (16 Stats., 195)?

2. Is the crime set out in the indictment a continuous one down to the time of finding the indictment?

3. Does the statute of limitations constitute a bar to this prosecution, the indictment having been found on the 15th of September, 1875?

4. Can the defendant be punished under section 31 of the act of March 3, 1873 (17 Stats., 575; R. S., sec. 5485)?

## BRIEF.

### I.

Does the act of July 8, 1870, §§ 7 and 8 (16 Stats., 195), repeal the above-mentioned act of July 4, 1864, §§ 12 and 13 (13 Stats., 389)?

It will be remembered that of these last-named sections the first (12) fixed the fees to be paid for collecting a claim for pension, bounty, &c.; and the other (13) punishes those who extort higher fees, or wrongfully withhold the money or land-warrant. In the act of July 8, 1870, the pensions are made payable directly to the

pensioner (§ 3, p. 194); and by section 7 a different tariff of fees is established; then section 8 declares the penalty against those who demand and receive higher fees, but there is no reference to any wrongful withholding. It does not refer to the prior statute, nor does it relate at all to the subject of *withholding* pensions; therefore the implication of a repeal as to this misconduct, or crime, is repelled.

II.

Is the crime of withholding a pensioner's, &c., money continuous?

One who holds my money to-day, received by him a year ago, and refuses to pay it to me, withholds it from me to-day as much as he did on the day it first came into his hands, if I then asked for and could not obtain it. The very suggestion of holding or withholding, in law or common parlance, embraces the idea of retention, of a *continued* denial of that which is demanded as a lawful right. If I have never been informed of its reception by him until to-day, and therefore could not demand it till now, certainly it is wrongfully withheld from me to-day. If any state of facts will support the verdict, they will be presumed to exist after verdict.

III.

If the crime is continuous, the bar of the statutes never can apply; so the answer to the third inquiry is determined by that given to the second, if this be answered in the affirmative. If the first knowledge of the receipt of the money, and its demand and refusal, were within the statutory time, the prosecution ought not to be considered barred.

## IV.

The liability to punishment under the statute of March 3, 1873, also depends upon the continuity of the offense. The language of the act, as before observed, is broad enough to cover this case. It punishes an attorney or agent who wrongfully withholds from a claimant the whole or any part of the claim allowed and due such claimant.

The foregoing is an almost literal reprint of my brief in the preceding case against Benecke, which relates to the withholding of *bounty* money.

Upon the question of Mr. Irvine's right to retain more than the statutory compensation, see my brief in No. 687, United States *v.* Hall, advanced and specially assigned for the 13th instant.

EDWIN B. SMITH,
*Assistant Attorney-General.*

